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IN THE

Supreme Court of the United States

October Term, 1969

NO. 1130

CAPITAL SOUTHWEST CORPORATION, ET AL,
Appellants

v.

ROBERT S. CALVERT, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, ET AL,
Appellees

ON APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

APPELLANTS' REPLY TO MOTION TO DISMISS OR AFFIRM

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Appellants wish to make this brief reply to the Appellees' Motion to Dismiss or Affirm filed herein, and in so doing will treat each of the three Points presented by the Appellees.

Under Point 1

Appellees again have refused to correctly state the basic legal principles upon which the validity of a statute creating a discriminatory classification is tested under the equal protection and due process

clauses of the Fourteenth Amendment of the United States' Constitution. Appellants acknowledge that the Fourteenth Amendment does not prohibit all discrimination *per se*. It is only when the discrimination which results from classification is unreasonable or arbitrary that the guarantees of equal protection and due process are abridged.

Appellants in their Jurisdictional Statement (pp. 25-27) have set forth landmark decisions handed down by this Court wherein the test to be applied in ascertaining whether or not such a resulting discrimination is unreasonable or arbitrary has been enunciated. To paraphrase, the discriminatory classification must rest upon differences bearing a reasonable and just relation to the *purpose and object* of the legislation. The mere fact that differences exist between the favored entity and the entity discriminated against is irrelevant unless the purpose and object of the legislation has a reasonable relation to these differences. Only by paying heed to the foregoing can the overall aim of these constitutional guarantees to treat alike all persons similarly circumstanced be realized.

Appellees, in their Motion to Dismiss or Affirm, have in essence said the purpose of the statutory exemption can be ignored. Appellees maintain that since differences do exist between open-end and closed-end investment companies, the classification which now has resulted in discrimination against the Appellants must certainly be a proper exercise of the state's power to

tax. In their wild scramble to cite differences, Appellees repeatedly refuse to relate the differences to the purpose of the exemption statute which is clearly set forth in the emergency clause accompanying its enactment. Appellees further confirm their position by their erroneous treatment of the cases they cite under Point I. This Court in all the cases cited by Appellees therein expressly considers the purpose of the particular statute in issue, and relates the purpose to the differences associated with the party discriminated against. For example, even the dissenting opinion in *Liggett Co. v. Lee*, 288 U. S. 517 at 576, 53 S. Ct. 481, 77 L.Ed. 960 cited by Appellees contains the following statement:

> "Whenever the discrimination is for a permitted purpose — as when a State, having concluded that activity by corporations should be curbed, seeks to favor businesses conducted by individuals — the corporate character of the owner presents a difference in ownership which may be made the sole basis of classification in taxation, as in regulation. The discrimination cannot, in such a case, be held arbitrary, since it is made in order to effect the permitted hostile purpose and is appropriate to that end." (Emphasis added.)

Furthermore, in their Motion to Dismiss or Affirm, Appellees make the statement that the case of *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32, 48 S. Ct. 423, 72 L.Ed. 770 at page 40 supports their position that legislative purpose can be ignored, and yet

the following is the statement found on the designated page:

> "It is made clear by the lower court that the purpose of the exemption was to enable these associations, by relieving them of a burden, more completely to carry out the quasi-public purpose which the legislature designed in providing for their creation." (Emphasis added.)

Concluding their reply to Appellees' Point I, Appellants submit that the differences which do exist between open-end investment companies and Appellants, as closed-end investment companies, cannot form a valid basis for the discriminatory classification because the differences bear no reasonable and just relation to the *purpose* of the exemption statute spelled out in its emergency clause and commented on in Appellants' Jurisdictional Statement (pp. 10-11, 26).

Under Point II

It is unclear to Appellants under this point what the Appellees strive to point out. However, lest there be any confusion as to what the Texas Court of Civil Appeals held, the Court is referred to the holding of the case (441 S.W. 2nd at 269, Jurisdictional Statement 93-94):

> "Considering the material differences between these two types of investment companies, as pointed out in this opinion, we do not believe the Legislature acted arbitrarily or unreasonably in exempting from payment of franchise taxes only 'open-end' or mutual investment companies."

Since the Texas court was asked to construe the statute in question, there can be no doubt that the foregoing is the holding of the case.

Under Point III

Appellees here seek to maintain that there are independent adequate non-federal grounds to support the judgment of the Texas Court of Civil Appeals. In so urging, Appellees have selected three so-called "requirements" which the Texas court found to be prerequisites to exemption under the statute in question.

In reply, it is Appellants' understanding that three elements must be present before it can be said that a case coming before the Court on appeal rests on independent adequate non-federal grounds: (1) the decision must in fact rest on a non-federal ground, (2) the ground must be independent of the federal question so as to qualify as a non-federal ground, and (3) the non-federal ground must be adequate in and of itself to support the decision. Lacking any one of these three elements, a case will not be deemed to rest on independent adequate non-federal grounds. Appellants say that none of these three elements is present in this case.

First, recalling that the holding of the case is that the exemption is only available for open-end investment companies, Appellants say this holding cannot possibly be based on the three "requirements" advanced by Appellees as non-federal grounds. In their Jurisdictional Statement (pp. 27-29) Appellants demonstrate

that if the "requirement" labelled number Four by Appellees is in fact a requirement, no investment company, including open-end ones, can qualify. Since it is impossible for any open-end investment company to meet this so-called "requirement," and since the holding of the Texas court was that only open-end investment companies were exempt, obviously the Texas court could not have based its holding on a ground with which open-end investment companies could not comply. As for the "requirements" Appellees have labelled Three and Five, Appellants deny what is therein said by Appellees. Under Three, if the Court will refer to the pages of the opinion cited the Court will see that the Texas court never found that each of the Appellants had exercised control over their portfolio companies. As for Five, Appellants have treated this in their Jurisdictional Statement (pp. 29-31).

Second, the non-federal grounds asserted by Appellees are not independent of the federal question presented. Appellants merely submit that to read the opinion of the Texas Court of Civil Appeals is to see how intertwined these alleged non-federal grounds are with the federal question. This is high-lighted by the following portion of the Texas court's holding quoted in full above (441 S.W. 2nd at 269, Jurisdictional Statement pg. 93):

> "Considering the material differences between these two types of investment companies, as pointed out in the opinion, ..."

Third, the alleged non-federal grounds are not adequate. It is well established that in order for a non-federal ground to meet the test of adequacy it must be tenable. Recalling Appellants' point above to the effect that the so-called "requirements" are impossible for even an open-end investment company to comply with, how can these alleged grounds be adequate when to incorporate them precludes even open-end investment companies from being exempt.

Concluding, under Point III, Appellants say that the Texas court's decision does not rest upon independent adequate non-federal grounds so as to preclude this Court's plenary consideration of this case on appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We, the Appellants herein, hereby certify that copies of the Appellants' Reply to Motion to Dismiss or Affirm herein have been served upon the attorneys of record for Appellees in the within cause by depositing same in the United States Mail, with proper first class postage prepaid, pursuant to Rule 33 of the Revised Rules of the Supreme Court of the United States, addressed to the Honorable Crawford C. Martin, Attorney General of Texas, Box "R", Capitol Station, Austin, Texas 78711; Mr. Nola White, First Assistant Attorney General, Box "R", Capitol Station, Austin, Texas 78711; Mr. Alfred Walker, Executive Assistant Attorney General, Box "R", Capitol Station, Austin, Texas 78711; Mr. John R. Grace, Assistant Attorney General, Box "R", Capitol Station, Austin, Texas 78711; Mr. W. E. Allen, Assistant Attorney General, Box "R", Capitol Station, Austin, Texas 78711; and Mr. William B. Hilgers, Special Assistant Attorney General, 300 West Eighth Street, Austin, Texas 78701, on this 27th day of February, 1970.

We further certify that all parties required to be served pursuant to the Revised Rules of the Supreme Court of the United States have been served.

HENRY D. AKIN, JR.
On behalf of all Appellants
herein with consent of Appellants'
individual counsel.